United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-1653 & 1871

To be argued by
RICHARD BROOK

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B 8/5

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Petitioner,

-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside an Order of the National Labor Relations Board and on Cross-Application for Enforcement

REPLY BRIEF FOR PETITIONER

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

C.A. Docket Nos. 74-1653
74-1871

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Petitioner,

-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside an Order of the National Labor Relations Board and on Cross-Application for Enforcement

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REPLY BRIEF FOR PETITIONER

The issue in this case is whether this Court should refuse to enforce the NLRB's order dated April 8, 1974 as written and require the NLRB to delete all reference to the phrase "any other employer or person" and words to the same effect so that the order is limited to the employer parties involved in this case.

This Reply Brief is addressed to three misleading thoughts in Respondent NLRB's Brief.

First, the Board's Brief has inappropriately relied upon several cases in an attempt to support their overly broad order.

Second, the Board's Brief took controverted testimony and relied on that, not just to find a violation, but to make a totally unjustifiable leap to imply from that proof of a generalized scheme to violate the Act as to totally unrelated parties.

Third, the Board's Brief failed to respond to facts pointed out in Petitioner's Principal Brief which establish that a broad order is not warranted in this case.

ARGUMENT

THE NLRB'S ORDER, BROAD AT BOTH ENDS, IS NOT ENTITLED TO ENFORCEMENT SINCE THE SCOPE OF THE ORDER IS NOT WARRANTED BY THE RECORD IN THIS CASE.

A. The Cases Relied Upon In The NLRB's Brief Are Readily Distinguishable

The NLRB's Brief, page 9, inappropriately cites several cases in support of the broad order which it issued in this case. Those cases do not stand for propositions they were cited for and/or involved factual situations materially different than the case at bar. The analysis of those cases already discussed in Petitioner's Principal Brief is not repeated here.

International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B., 341 U.S. 694 (1951) is inapposite. That case involved an order which was broad at one end, i.e., only the prohibitory/introductory clause referred to conduct as to "any employer". Thus, there is no support at all in the Local 501 case for an order broad at both ends, as in the order in the instant case. The Court found that remedy justified because the conduct complained of, if aimed at other subcontractors on the same job, may well have had the same

effect, i.e., to cause other employers to cease doing business with Langer, a non-union electrical subcontractor. In the instant case there is no array of similarly situated companies involved on the job. Mandell & Corsini employees not employees of another subcontractor or of several other subcontractors allegedly engaged in proscribed conduct.

N.L.R.B. v. Local 282, International Brotherhood of Teamsters, 344 F.2d 649 (2d Cir. 1965) is readily distinguishable on the ground that the broad order there was based upon three prior violations which had just occurred within a short period of time. The three prior Local 282 cases arose within a three-month period and the Board's decisions were rendered within nine months of each other. Local 282 International Brotherhood of Teamsters (Twin County Transit Mix, Inc.), 137 NLRB 858 (June 26, 1962) (conduct in July, 1961); Local 282, International Brotherhood of Teamsters (Precon Trucking Corp.), 139 NLRB 1077 (Nov. 19, 1962) (conduct in July, 1961); Local 282, International Brotherhood of Teamsters (J.J. White Ready Mix Concrete Corp.), 141 NLRB 424 (March 13, 1963) (conduct in September, 1961). All three prior violations were close in time to the violation there at bar. Local 282, International Brotherhood of Teamsters (U.S. Trucking Corp.), 146 NLRB 956 (April 20, 1964)

(conduct in October, 1962). In the case at bar there is a large time span between violations; the only two which are less than a decade old are de minimus (Enterprise Fire Sprinkler) and on appeal, the Austin case.

In addition to the different timing of the violations, the Local 282 cases involved more wide ranging conduct. Twin City Transit Mix, Inc. involved a boycott aimed at numerous companies, and involved repeated threats of violence, picketing and violence. 137 NLRB at 864-866. In the instant case, only one employer was involved and no act of violence or picketing is even alleged. Precon Trucking Corp. involved an industry-wide boycott whereas only one employer is involved in the instant case. J.J. White Ready Mix Concrete Corp. involved incidents at eleven job sites, involving numerous employers. In the instant case, there was no conduct at all, and the alleged refusal to handle was more theoretical than real, occurred at one site only, and involved only one employer. U.S. Trucking Corp. also involved numerous employers, whereas only one employer is involved in the case at bar. Thus, there are underlying differences between the history of both unions under the Act: Local 282 had three violations, each involving many employers and/or an industry-wide campaign,

significant picketing and/or violence, all occurring within a few months. Local 638's prior violations are for the most part over a decade old, involved no violence, picketing, if any, was limited in scope and was peaceful, and numerous employers were not involved.

N.L.R.B. v. Operating Engineers, Local 571, 317 F2d 638 (1963) is an Eighth Circuit decision which is out of line with this Circuit's rationale concerning the propriety of broad orders. Even in that case, unlike here, there was evidence in the form of widely distributed letters and that Court stated that the letters "show that respondent's dispute with Layne-Western potentially involves an indeterminate number of secondary employers." 317 F.2d at 644. That order was broad at one end only (prohibitory, opening language) and lends no support to the double ended broad order in the instant case.

N.L.R.B. v. Associated Musicians of Greater New York, Local 802, 422 F.2d 850 (2d Cir. 1970) is distingishable because in that case there was an admission by the union's president reflected in the trial examiner's decision "that it was the union's policy to unionize all people who conduct." and thus the broad order was found by this Court to be justified

so as to be coextensive with the admittedly wide ranging scheme to violate the Act in that case. Here, in contrast, there is no wide ranging scheme and nothing whatsoever in the Record which would establish such.

N.L.R.B. v. Local 25, I.B.E.W., 383 F.2d 449 (2d Cir. 1967) cited by the Board to show that a generalized campaign of illegal activity is required in order to sustain a broad order is distinguishable on precisely that point, i.e., there the Board found and the Record showed, an admission of a widespread practice; here no such evidence exists. In addition, the order in that case was not broad at both ends as is the order in the instant case so that the Local 25 case in no way supports the extraordinary relief sought in the instant case.

N.L.R.B. v. Local 138, Operating Engineers, 377 F.2d 528 (2d Cir. 1967) is distinguishable because the Record there supported a finding of widespread and repeated jurisdictional disputes between two unions; in contrast, here there is no repeated pattern of controversies relating to vertical fan coil units. Also, the order in the Local 138 case (limited to not forcing assignment of work on two specific types of equipment; namely, "plaster mixing machines and plaster pumps

used for piping and propelling wet plaster") is not as broad in the instant case (unlimited in any way - any employer - any equipment - any violation of 8(b)(4)(B).).

N.L.R.B. v. Milk Drivers Local Union 584, 341 F.2d 29 (2d Cir. 1965), cert. denied, 382 U.S. 816, is distinguishable on the ground that there was proof of the union's "avowed intention to close the many retail milk shops operated by the bargaining unit's members" 341 F.2d at 33 and because the order there was limited in its object or closing language to disputes with employers operating retail milk stores in claimed violation of the labor contract. Here, there is no proof of any multi-employer boycott and the order is not limited to the type of dispute at bar (installation of prefabricated vertical fan coil units).

N.L.R.B. v. Local 810, 299 F.2d 636 (2d Cir. 1962) is distinguishable on the basis of the violent means used in that boycott and on the ground that the order there was broad at only one end.

The authorities relied upon by the NLRB do not support the issuance of a double ended broad order in this case.

B. The NLRB's Brief Relied Upon Ambiguous and Controverted Testimony to Form an Unjustified Assumption that the Union Engaged in a Generalized Pattern of Violations and then Assumed Further that the Union Would Violate the Act in the Future

The NLRB Brief all but admits that the Board has built its case upon a house of cards.

The NLRB found a violation in this case on the basis of meager testimony. While the Union has not challenged the Board findings on the ground of lack of substantial evidence, it is significant that the testimony relied upon is both ambiguous and controverted. There is no testimony in this Record on the issues of "proclivity" to violate the Act or a "generalized" scheme to do so. On the basis of the contradicted and ambiguous testimony, the Board made an assumption that the Union had a general policy, and that because of that alleged union policy repeated violations are likely. These assumptions are not supported by the facts in this Record. There is no evidence to support a conclusion that this Union was engaged or will conduct a generalized scheme to violate the secondary boycott provisions of the Act.

The NLRB's Brief at page 10, refers to statements allegedly made during a meeting in January, 1973 to support its contention that this Union has a "generalized campaign" and "proclivity" to violate the secondary boycott provisions of the Act.* The testimony contained at A-101, 103-108, which is all that the Board relies upon for this contention, is so ambiguous and sufficiently contradicted so as to raise questions as to whether the Board's conclusion is even supported by substantial evidence. Regardless of whether there is sufficient evidence in the Record to support a violation in this case, there is clearly insufficient evidence to support an inference that the Union was engaged in a generalized campaign of violative activity and it is even clearer that the Board acted improperly in making assumptions based upon that inference that the Union would violate the Act in the future.

The superintendent employed by Mandell & Corsini refuted the contentions concerning the supposed 8(b)(4)(i)(B) violation involving the inducement of a work stoppage. A-114-120; Business Agent John Donnelly refuted those allegations as well. A-139.

Mr. Donnelly also denied Mr. Corsini's testimony

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* References to the Appendix are cited as "A-"; references to the Transcript of the hearing before the Administrative Law Judge are cited as "Tr-"

concerning the alleged 8(b)(4)(ii)(B) violation involving a threat against Mandell & Corsini and explained that the reference to bloodshed concerned a potential jurisdictional dispute between the Steamfitters and another union, namely, the Riggers. A-146-148; A-163. Mr. Corsini admitted discussing the jurisdictional question with Mr. Donnelly. Tr 51-52.

As to the alleged statements made at the meeting between the Union's Business Agents and the Directors of the employer association on January 30, 1973, a review of the Record indicates that the statements attributed to the Union Officers, which were part of an informal luncheon conversation, are ambiguous and/or contradicted. Generalized statements by unnamed people are too vague to support an order of this magnitude. A-104. That units manufactured out of town would "not be installed," (A-101) that certain units would or would not be "acceptable" (A-106,107), or that there may be "objections" to such units (A-151) are statements consistent with the bringing of an arbitration which would preclude the use of these units directly or through an award of damages. Mr. John Tracey, the Union's Business Agent at Large, did not recall discussing the question of vertical fan coil units with Mr. Corsini at all and he denied knowledge of any generalized boycott of vertical fan coil units. A-139-141.

Mr. Donnelly also denied that there was any generalized threat or scheme. A-156-157.

In addition to all of the above, the Union attempted at the hearing, through counsel, to develop the fact that references to "labor troubles" or certain equipment being "not acceptable" meant the Union could file grievances pursuant to the rules of the collective bargaining agreement. See Tr-142, A-153. In this connection, it should be noted that the controversy in question was submitted to the industry arbitrator pursuant to the rules of the collective bargaining agreement and that the arbitration was held on April 26, 1974 and July 11, 1974; the arbitrator rendered a decision denying the Union's claim that Mandell & Corsini violated the agreement by using these prefabricated units. The single page award, which accompanied the arbitrator's opinion, is annexed hereto as Exhibit A. This arbitration is significant to show that the Union pursued peaceful contractual remedies available to it in accordance with the national policy favoring arbitration. United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

Significantly, the Administrative Law Judge precluded testimony offered by counsel for Mandell & Corsini to "establish that the real object of the union in this case was to cause Mandell & Corsini to do business with Modular Energy Corporation" on the ground that "That is not alleged in the complaint so that it is irrelevant to the complaint before me." Tr-100. See also Tr-112-113. Thus, the Administrative Law Judge limited the testimony to the issue of whether there was a boycott of Trane; he expressly forbid evidence which was offered by the employer's attorney to try to establish that all other manufacturers in addition to Trane may have been boycotted in favor of Modular Energy Corporation. Since no evidence to establish a "generalized scheme" was allowed, the Union could not possibly have introduced contrary testimony and was in effect precluded from answering the non-existent charges of a "generalized scheme."

C. The NLRB's Brief Did Not Address Itself to the Factors Pointed Out in Petitoner's Principal Brief which Militate Against a Broad Order

The NLRB has set forth in its brief cases in which issuance of a broad order has been upheld by the Courts, and the Union's Principal Brief has set forth cases in which a

broad order was found unwarranted. The cases, read in toto, establish a pattern and standard by which the actions of the Union may properly be judged. These standards are perhaps best set forth in the recent decision of this Court in NLRB v. Local 25, IBEW, AFL-CIO, 491 F.2d 838 (1974). The justification or rationale for a broad order, as this Court has stated, exists only when a union's conduct is such as to indicate that it will continue to violate the law unless precluded from doing so by a broad order.

The NLRB's Brief failed to adequately analyze this Union's record according to the well established standards set forth and summarized in Petitioner's Principal Brief at pages 12-13. Thus, the Board failed to acknowledge that judicial recognition should be given to the fact that the Union has thousands of members and has jurisdiction over all of New York City and Long Island. San Francisco Local Joint Executive Board of Culinary Workers v. NLRB, 86 LRRM 2828 (D.C. Cir. 1974).

The Board's Brief, page 12 argues that violations should be considered. This is contrary to the rationale expressed by the Board and the Courts that it is the close timing of violations as well as the number of violations

which justify an inference that a union is simply ignoring the law. The Board cannot justify seeking broad orders on the ground of "recent" violations in some cases and on the ground of "historical" violations here. Local 282 cases, supra.

The Board ignores the fact that there is no "targeted" employer victim here. NLRB v. Local 3, IBEW, 477 F.2d 260 (2d Cir. 1973), cert. denied, 414 U.S. 1065.

The Board ignored the fact that one of the only two prior violations in this decade, the Austin case, is on appeal and may vanish as a "violation" at any moment.

The Board does not deny the fact that no evidence was introduced concerning any industry-wide scheme or practice to violate the law; the Administrative Law Judge confined the hearing to the dispute in question.

The Board at page 12 of its Brief attempted to distinguish this Court's decision in N.L.R.B. v. Local 25, IBEW, 491 F.2d 838 (1974). That case is highly applicable to the case at bar. Here, as in that case, there was no evidence to establish any conduct aimed at any employer other than the employers involved in the proceeding (i.e., no violations as to employees other than Comptech's;

no inducement as to employees of anyone other than Mandell & Corsini here).

CONCLUSION

For the reasons set forth herein, and in Petioner's Principal Brief, the Board's double ended broad order should not be enforced.

Respectfully submitted,

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Of Counsel:

Richard Brook

IN THE MATTER OF THE ARBITRATION BETWEEN

MANDELL & CORSINI, INC.

- and -

ENTERPRISE ASSOCIATION, STEAM-FITTERS LOCAL UNION 638

AWARD OF ARBITRATOR

I, ARTHUR STARK, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and having duly heard the proofs and allegations of the Parties, hereby make the following award:

Local 638's claims with respect to the installation of Trane vertical fan coil units at North Shore Towers are denied.

Dated: August 20, 1974

State of New York } ss.:

County of New York

On this 20th day of August, 1974, before me personally came and appeared ARTHUR STARK, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DOROTHY C. STARK
Notary Public, State of New York
No. 31-9156625
Qualified in New York County
Commission Expires March 30, 1976

Exhibit A

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

Preston Anderson, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 960 Simpson St Bronx N.Y.

That on the 11 day of Nov 19 74 deponent served the within Reply Brief for Petitioner upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served together with the names of the clients represented and the attorneys' designated addresses:

Elliot Moore Esq.
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Ave N.W.
Washington, D.C. 20570

Preston Anderson

Sworn to before me this
11 day of Nov 1974

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1975